



Western Communications, Inc.

3106 S. HIGHWAY 13, SIOUX FALLS, SD 57701 • PHONE 605-342-7885



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Ms. Magalie Roman Salas
Office of the Secretary, Federal Communications Commission
The Portals
445 Twelfth Street, S.W. Room TW-A 325
Washington, DC 20554

RE: Comments to NPRM in WT Docket No. 99-87.

Dear Ms. Salas,

In this letter I would like to make several comments to the Federal Communications Commission (FCC) in response to the NPRM in WT Docket No. 99-87. I have enclosed nine copies of this correspondence and would appreciate it if you would give a copy of this letter to each FCC Commissioner.

I am the President of Western Communications, Inc. a two-way radio sales and service company that has provided wireless communications services in Western South Dakota for nearly forty years. We service 2,245 companies who currently use two-way radios or other wireless products. We have 1,155 farm and ranch customers, 60 customers in the construction businesses, 75 customers in cable TV, broadcast TV and other communications businesses, 40 customers in automotive related business such as dealers, repair shops, and towing companies, 40 customers in the transportation field such as railroads, taxis, and trucking companies, and 875 customers in other types of businesses such as contractors, doctors, attorneys, engineers, architects, surveying crews, food service companies, hotels, motels and gas companies. In each of these companies, we estimate about ten people will use two-way radio for communications. I think that you can see that about 22,000 people in our service area alone rely on two-way radio communications to increase their business efficiency and to provide for the safety and welfare of their family and employees. We are only one of 12 two-way radio companies in South Dakota, so it would be safe to say that about 1/3 of all South Dakotans rely on two-way radios.

Western Communications, Inc., as a company, has many active FCC licenses. We have several VHF and UHF licenses that we use for our business communications, as well as having SMR and Private Carrier Paging licenses in South Dakota. In addition during our entire company history, we have provided guidance, assistance and advice to all of our two-way radio customers regarding FCC license issues. From our years of dealing with our customers and watching the changing attitude of the FCC, I have several general comments regarding the NPRM in WT Docket 99-87 and several comments regarding specific paragraphs in the NPRM.

General Comment # 1. There is no public demand to change the existing licensing rules for private wireless licenses.

In the NPRM, there are numerous references to the "public interest". I would like to start by

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telling the FCC that there is **no public demand** to change the existing licensing rules for private wireless licenses. I have never had any FCC licensee tell me that they want the FCC to completely overhaul their licensing system. Since there is obviously no public groundswell to change the existing licensing rules, it would appear that the encouragement to change the FCC system to issue Private Mobile Radio Service licenses must come from special interest groups such as large communication providers, or from the FCC's internal goals to simplify the FCC's administrative tasks at the expense of the current radio users.

General Comment # 2: The FCC needs to get off the 'AUCTION' bandwagon!

The general tone of the entire NPRM is that auctions will be used to issue licenses for everything but Public Safety spectrum and that the intent of the NPRM is to try and come up with a painless transition strategy. I seriously disagree with this general premise or tone and feel that auctions are not in the public interest for virtually all spectrum, particularly for that spectrum that is currently being used by large numbers of incumbent FCC licensees. As reported in the NPRM, the current statutes indicate that the FCC may auction spectrum "if mutually exclusive applications are accepted for filing for any initial license". It seems clear to any objective observer, that the FCC has the resources and ability **to make sure that no mutually exclusive applications are accepted by the Commission.** It also seems clear that the FCC lacks the desire to implement this environment but rather the FCC seems intent upon creating the mutually exclusive license applications so that the FCC then has the justification to auction off the spectrum. On December 22, 1998, five high ranking members of Congress sent a letter to Chairman Kennard (copy attached) stating their concern regarding the FCC's apparent misinterpretation of the auction statutes. In the December 22, 1998 letter, the Congressmen stated " *Congress Emphasized that the Commission was obligated to consider ways to avoid mutual exclusivity among applicants before conducting an auction*". I would suggest that the FCC should consider the direct communications from Congress over the interpretive comments solicited by the NPRM and subsequently eliminate auctions as the primary tool for distributing FCC licenses.

General Comment # 3; The FCC should consider the economic and disruptive costs of changing the licensing system for Private Mobile Radio Systems (PMRS).

Even with all the questions that were contained in the NPRM there was not much evidence that the FCC is concerned with the practical impact on the existing licensees of changing the method of issuing Private Mobile Radio System FCC licenses. In making decisions that will affect literally millions of existing licensees, the FCC should consider the economic cost of converting from an existing two-way radio system to any other system that may be provided by the auction winner of a geographic license. The FCC needs to consider the stranded or sunk investments in existing two-way radio equipment, as well as the disruptive influence on business operations due to the uncertainty of licensing procedures and the cost of these licenses.



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Hopefully, the FCC would never consider forcing all telephone users to abandon their old telephone and be required to buy new telephones so that the FCC could institute a technology change in the telephone industry. Anyone with any common sense would expect an outright rebellion of all telephone users if such a policy was implemented. However, the FCC doesn't appear to have any problem forcing millions of two-way radio users to abandon their old two-way radio equipment and then purchase equipment from some new geographically licensed commercial wireless spectrum provider, to get the same kind of service they had in their old Private Mobile Radio System. The FCC needs to carefully consider the economic, safety and productivity costs to small businesses and individuals to change radio systems against the hypothetical benefits to the General Fund, the FCC's workload, or to some hazy vision of the public interest.

General Comment #4: The FCC needs to maintain a licensing system that is flexible enough to accommodate the difference between rural and urban two-way radio users.

The FCC has embraced the incorrect assumption that if the FCC auctions spectrum to the highest bidder, market forces will force the high bidder to offer a wide variety of competitive communication services to the license area to provide an appropriate return-on-investment. The practical economic reality is vastly different than the FCC's glorious competitive vision. When the population density is too low to justify installing expensive wireless infrastructure, the commercial wireless providers simply abandon the area and concentrate on population centers where they can make a profit. **The impact on the lightly populated rural areas is that not only do they not get competitive services, they don't get access to any services at all.** A recent example of this phenomena was reported in the May 24, 1999 Wireless Week. I have enclosed a copy of that article, plus a copy of the letter that Nextel sent to users on these SMR systems, which clearly shows that when large commercial wireless operators (NEXTEL) obtain licenses in lightly populated areas they do not offer a broad variety of competitive services, but rather abandon the existing customers to a shrinking number of two-way radio options.

COMMENTS TO SPECIFIC NPRM PARAGRAPHS.

NPRM WT Docket 99-87 Paragraph 7.

In this section the document describes the public interest objectives from Section 309(j)(3) that are target goals of the competitive bidding procedure. I would like to point out that the current method of issuing PMRS licenses has already accomplished the second objective of "promoting economic opportunity and competition...avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women." The FCC should strongly consider maintaining the productive and workable licensing system that is currently in use.

NPRM WT Docket 99-87 Paragraph 12 and Paragraph 61.

These paragraphs are a far too kind oversimplification of a sad and bitter episode of FCC



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history regarding the 800 Mhz. SMR frequencies. This wholesale abandonment of the independent regulatory process should be exposed to those FCC Commissioners who were not party to this betrayal of the small SMR operators. Through the novel inducement of exclusive use of the spectrum for a site-specific license, tens of thousands of SMR operators invested millions of dollars to build out a new technology and serve millions of customers. For a variety of political and avaricious reasons the FCC fabricated the concept of Geographic licenses and rammed through a program to auction SMR spectrum that had already been licensed for 20 years. Businessmen who were following the FCC rules and loading one SMR before applying for a license in an adjoining area, were stranded for years during the SMR licensing freeze and abandoned during the subsequent auction. Nextel was granted the vast majority of SMR frequencies in the SMR upper 200 channel auction and has already demonstrated that they are not interested in providing service to rural areas. The FCC has already demonstrated that they are fickle and easily swayed by powerful forces regarding the SMR frequencies. I am hopeful that the comments received for this NPRM will be sufficient to prevent another sad and bitter FCC story.

NPRM WT Docket 99-87 Paragraph 19

I would like to emphasize the point in this section that the FCC is obligated to use engineering solutions, negotiation, threshold qualifications, service regulations and other means to avoid mutual exclusivity in licensing applications. I would further point out that the current licensing system for PLMRS licenses has successfully done this for many years.

NPRM WT Docket 99-87 Paragraph 41

I am strongly opposed to the creation of a third radio pool (Public Service Radio Pool). Every PLMRS license holder is concerned with the safety of life, health and property. The organizations that are petitioning to create a third pool certainly have unique radio coverage requirements but so do many other businesses and organizations. I would strongly encourage the FCC to adopt licensing rules that are flexible enough to accommodate the advocates of the third pool and rural two-way radio systems.

NPRM WT Docket 99-87 Paragraph 60

In this paragraph the FCC asks the question; "With respect to services currently using licensing schemes in which mutually exclusive applications are not filed, did Congress, in emphasizing our obligation to avoid mutual exclusivity, intend that we give greater weight to that obligation and less to other public interest objectives." It seems that the FCC is either missing or diffusing the point here. The FCC has an obligation to come up with a licensing scheme that meets public interest objectives whether that licensing system is the coordination process that is currently used to allocate PLMRS licenses or an auction process to distribute licenses for new spectrum. The point is not mutual exclusivity vs. public interest, the point is what licensing scheme best serves the public interest. In very cases do auctions best serve the public interest.

NPRM WT Docket 99-87 Paragraph 63

Nowhere in the NPRM is the circular reasoning of the FCC regarding mutual exclusivity and auctions more apparent than in the footnote 187 to Paragraph 63 where the NPRM states "The



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Commission also has found that in some instances the use of geographic licensing and competitive bidding avoids unnecessary mutual exclusivity.” The statutes clearly show that the FCC is authorized to auction spectrum only when mutually exclusive applications are not preventable by other methods. Yet in this footnote, the FCC is saying that mutual exclusivity created the need for geographic licenses and auctions which then avoids mutual exclusivity. Does the FCC feel that they can string the words “mutual exclusivity”, “public interest” and “auctions” together in any type of sentence to justify whatever point they are trying to make?

I also feel that the statement in Paragraph 63 which says “...the Commission has found that geographic area licensingis easier for the Commission to administer” is the primary reason for this NPRM and for the whole program to change FCC licensing systems. Easing the workload of the FCC I feel is the primary motivator for the entire program to change the licensing system and is not in the public interest. The FCC now resembles an organization of Forest Rangers who had all the biologists replaced with attorneys who don’t like trees. Now the “Forest Rangers” want to sell the trees to the highest bidder because the trees are so messy, everybody wants one and they would have to keep track of all different kinds of trees, if the Forest Rangers continue to be responsible. The FCC should be a independent regulatory agency, not a platform for short-time attorneys to sharpen their sales and auction skills.

NPRM WT Docket 99-87 Paragraph 77.

Here the FCC addresses the bedrock concerns of the private wireless operator’s concerns about competing for spectrum with a commercial wireless service provider. The FCC is entirely correct in stating that this is a tremendous concern to virtually every private wireless operator. All FCC licenses who have communicated with me about this concern eventually ask the question; “Why is the FCC going to force me to deal with a middleman or commercial provider to get access to spectrum that is directly under FCC control? How can this plan which adds cost and complexity to my business life, be in my public interest?

NPRM WT Docket 99-87 Paragraph 91.

I am thunderstruck by the stupidity of the statement; “Because market forces have not, to date, played a roll in the availability and licensing of private spectrum, the Commission lacks a reliable method for objectively gauging the current and future demand for private spectrum.” It would appear that the FCC is either unaware of the millions of private wireless FCC licenses that are currently used to promote the safety and productivity of businesses and individuals, or they are overlooking these facts to further advance their “Band Manager” agenda (They really want to sell all those messy trees!) To use the FCC’s lack of awareness about their own databases and the many important uses of private wireless systems as justification for the “Band Manager” concept is absurd.

**In conclusion I would like to say, do not auction the Private Wireless Spectrum!
Auctioning the Private Wireless Spectrum would have an incredible negative economic impact
and would be very disruptive to the safety and productivity of small businesses and individuals.**



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Respectfully,

Michael A. Lees
President
Western Communications, Inc.

Attachments:

1. December 22, 1998 letter from Congress to Chairman Kennard.
2. May 24, 1999 Wireless News article; Nextel to Turn Off S.D. Analog Network
3. May 5, 1999 letter from Nextel to S.D. customers- Termination of Service

cc: Senator Tom Daschle
Senator Tim Johnson
Congressman John Thune
Gary D. Michaels, FCC

Congress of the United States
Washington, DC 20515

December 22, 1998

The Honorable William E. Kennard
Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Chairman Kennard:

In August 1993 Congress enacted section 309(j) of the Communications Act of 1934 (47 U.S.C. §309(j)) granting the Commission the authority to utilize competitive bidding to award radio licenses. As part of that law, Congress included paragraph 6(E), which states:

Nothing in this subsection, or in the use of competitive bidding, shall be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings. 47 U.S.C. §309(j)(6)(E).

Since that time we have been concerned that, in both its general spectrum management activities and its implementation of section 309(j), the Commission has frequently ignored this provision of the law. Instead, the Commission has adopted policies resulting in mutual exclusivity that could have been avoided.

Nowhere has this practice been more apparent than with respect to the Commission's treatment of private wireless services.

Our concerns about the Commission's policies were heightened by recent trade press reports indicating that the Commission staff feels their "hands are tied" and that "additional tools for spectrum management" may be needed. See Jeffrey Silva, *Phythyon Confirms FCC Proposal to Auction Private Wireless Spectrum*, RCR News (Nov. 2, 1998). To the extent that these comments are an accurate reflection of the Commission's views, we would like to set the record straight before the Commission releases its *Notice of Proposed Rulemaking* ("NPRM") to address private wireless issues.

Because we were concerned that the Commission was ignoring its obligations under section 309(j)(6)(E), Congress amended section 309(j) to emphasize the Commission's responsibility to avoid mutual exclusivity whenever possible. Specifically, section 3002 of the Balanced Budget Act of 1997 ("BBA") amended the Commission's general authority to utilize competitive bidding to read as follows:

If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection. Pub. L. No. 105-33, §3002 (1997) (emphasis added).

Congress's explanation of this change is unambiguous. While a portion of this section expanded the Commission's authority to utilize competitive bidding, Congress emphasized that the Commission was obligated to consider ways to avoid mutual exclusivity among applicants before conducting an auction. Specifically, the Conferees stated that:

Notwithstanding its expanded auction authority, the Commission must still ensure that its determinations regarding mutual exclusivity are consistent with the Commission's obligations under section 309(j)(6)(E). The conferees are particularly concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity. H.Rept. 105-217, at 572 (1997).

Congress did not engage in an idle act when it legislated this change. It did so for a reason. The Commission must not ignore what Congress enacted by reading this provision out of the law and adopting policies inconsistent with statutory requirements.

In addition to clarifying the Commission's obligations to avoid mutual exclusivity, the BBA also contained provisions that were intended to increase frequencies available for shared or exclusive use of private wireless services. In the explanation of Section 3002(e) of BBA, the Conferees stated their expectation that "the Commission and the NTIA [would] consider the need to allocate additional spectrum for shared or exclusive use by private wireless services **in a timely manner.**" H.Rept. 105-217, at 575 (1997) (emphasis added).

The remarks attributed to the Commission staff and reported in the trade press reveal at least two fundamental misunderstandings regarding the BBA amendments to the Communications Act.

The Honorable William E. Kennard

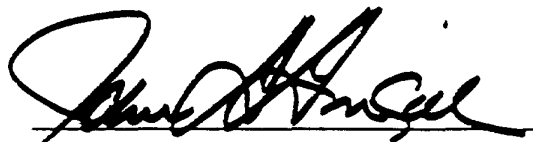
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As we noted above, it is our understanding that the Commission will soon release a *NPRM* that will reach tentative conclusions with respect to the private wireless service that are inconsistent with law and the intent of Congress when it passed the BBA. We are troubled by disclosures that the *NPRM* will tentatively conclude that the Commission has no alternative but to utilize competitive bidding. We are equally troubled that the *NPRM* apparently will not propose any additional frequencies for the private wireless service.

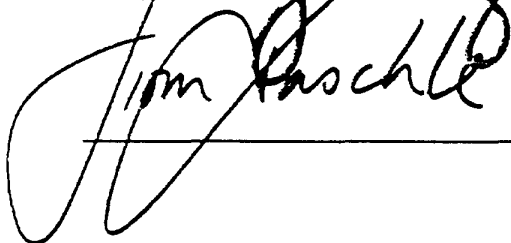
In our view, the *NPRM* should be substantially revised before it is issued. In particular, any tentative conclusions on policy should incorporate the Commission's ongoing duty to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings. It should also identify additional frequencies that have the potential to be allocated for private wireless services, consistent with Congress's instructions when the BBA was enacted.

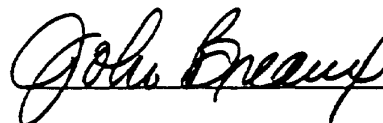
We look forward to hearing from you regarding this important matter.

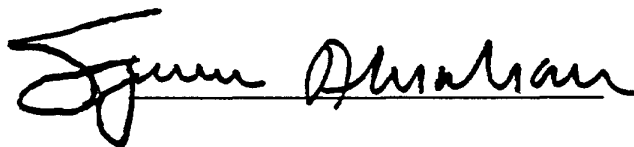
Sincerely,











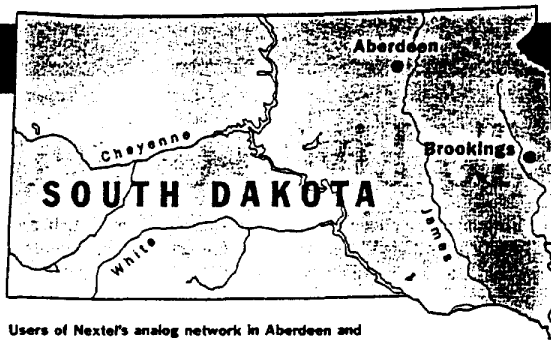
News

Nextel from page 1

Many in the industry question why Nextel should be allowed to tap into private spectrum—as well as previously off-limits spectrum in the 900 MHz band—when it cannot support its existing infrastructure and customers. In Ab-

erdeen and Brookings, S.D., for example, Nextel informed customers this month that it will terminate analog dispatch radio or telephone interconnect service Aug. 1.

"Due to reduced customer[s], it is no longer economically feasible to continue operating this sys-



Users of Nextel's analog network in Aberdeen and Brookings received termination of service notices this month.

tem," Nextel said in service termination notices May 5. Two-way radios used in these markets will become obsolete on the network, and the notices do not offer customers alternative service options. When Nextel pushes customers off its system, competing operators would like to accommodate them but frequently cannot because of spectrum constraints.

The pending waiver requests—the latest in a long history of rule waivers sought and obtained by Nextel—are particularly irksome to business advocates who have watched the traditional dispatch industry dwindle as Nextel gradually amassed the lion's share of 800 MHz SMR spectrum from smaller operators. Some spectrum acquired by the industry giant—including frequencies won at auction—remains unused while other operators are forced to turn away customers for lack of spectrum.

To fight the erosion of the all-too-constrained private radio spectrum base, the Personal Communications Industry Association and Industrial Telecommunications Association are speaking with a united voice. They suggested that the commission grant Nextel its waivers on the condition that the frequencies be used only to relocate private wireless and small private carrier licensees. Five other organizations also representing private wireless users oppose unconditional grant of the waiver requests.

Nextel did not respond to questions about the waiver requests or service termination in South Dakota markets.

Private wireless and small operators have long criticized the commission for "regulation by waiver" in the dispatch radio industry. Many complain that if the current waiver issue is merely the latest step in a broader effort to move private users onto commercial systems, the FCC should act by changing the rules rather than repeatedly bending them.

Converting spectrum for use on its nationwide digital SMR network, Nextel has reduced the number of dispatch suppliers and service options overall. The conversion often means customers lose the value of the investment made in radios, and they are then charged rates by Nextel that are generally higher than those charged by traditional dispatch operators. According to The Strategis Group, last year Nextel dropped 173,000 basic dispatch subscribers from its service. **W**

Nextel To Turn Off S.D. Analog Network

By Caron Carlson

WASHINGTON—Nextel Communications Inc. will shut down analog dispatch service in at least two regions of South Dakota this summer and possibly leave the spectrum there fallow, all the while awaiting FCC waivers to secure more spectrum—this time from private radio.

In the coming weeks, the FCC is expected to decide whether to give Nextel the prerogative—historically the purview of the government—to determine whether spectrum allocated for private systems can be used commercially. While FCC rules prohibit this use, Nextel last fall asked for waivers to acquire 54 private radio licenses and either incorporate them into its nationwide network or use them to relocate licensees the company displaced in the 1997 specialized mobile radio auction.

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NEXTEL

201 ROUTE 17 NORTH
RUTHERFORD NJ 07070

MAY 5, 1999

IMPORTANT SERVICE TERMINATION NOTICE

Re:

Dear

We regret to inform you that effective August 1, 1999 we will no longer offer analog dispatch radio or telephone interconnect service on SD ABERDEEN system 053F. Due to reduced customer, it is no longer economically feasible to continue operating this system. Beginning August 1, 1999, your two-way radios will not operate on this one system within your network.

Our billing records indicate that you use this analog radio system. Since our records may not be current, please contact your local radio shop or dealer to confirm that you are using this system. If you discover our billing records are not correct, please call us at the number below to avoid service interruption. If your use of this system is confirmed, your dealer may assist you in exploring other service options. If you make alternative communications arrangements prior to the service termination date above, please call us to stop your service billing.

We apologize for any inconvenience this may cause you. If you have any questions or require further information, please call Nextel's Analog Customer Care department at 1-800-969-2929.

Sincerely,

ANALOG CUSTOMER SERVICES